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No. __-___

IN THE

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

CHARLES ROBINSON, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

RICHARD K. BERNARD
Vice President and General Counsel
CAROL SUE BARNETT
Deputy General Counsel
METRO-NORTH COMMUTER
RAILROAD COMPANY
347 Madison Avenue
New York, New York 10017
(212) 340-3000

MYRON D. RUMELD
Counsel of Record
SHARI B. FALLEK
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Petitioner

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QUESTIONS PRESENTED

1. In adjudicating a motion for class certification of company-wide claims of employment discrimination, must the district court disregard an expert opinion offered by the company to demonstrate that the plaintiffs' statistical evidence of race-based disparities does not satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure (FRCP)?

2. Can the standards for class certification set forth in FRCP 23(b)(2) be satisfied in an employment discrimination suit that seeks recovery of individualized relief, including compensatory damages, for allegedly discriminatory decisions attributable to hundreds of individual supervisors?

3. In a suit alleging a company-wide pattern and practice of employment discrimination, are plaintiffs automatically entitled to class certification of their claims for class-wide liability and injunctive relief, pursuant to FRCP 23(b)(2), without regard to whether their individual claims for relief are suitable for class certification?

LIST OF PARTIES

The defendant-petitioner is Metro-North Commuter Railroad Company ("Petitioner" or "Metro-North").

The following plaintiffs-respondents appealed to the Second Circuit the district court's decision denying their consolidated motion for class certification and bifurcation in *Robinson v. Metro-North*: Charles Robinson, Sharon E. Mack, James Oliver, Darryl F. Simpson, Veronica Caridad, Donald Hines, James Jackson, Lord Taylor, Earl Vaughan, Daniel Canada, Marvin Edwards, Eric Jones, and Raymond Norris.

CORPORATE DISCLOSURE STATEMENT

Metro-North Commuter Railroad Company is a public benefit corporation and a wholly-owned subsidiary of the Metropolitan Transportation Authority. *See* N.Y. Pub. Auth. Law §§ 1260, *et seq.* (McKinney's 1999 & Supp. 2001).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Metro-North Commuter Railroad Company ("Petitioner" or "Metro-North"), respectfully petitions this Court to issue a writ of certiorari to review the October 9, 2001 and July 29, 1999 decisions of the United States Court of Appeals for the Second Circuit. The Second Circuit's decision and order of October 9, 2001 vacated and remanded a decision of the United States District Court for the Southern District of New York insofar as it had denied plaintiffs' motions for class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure (FRCP) and bifurcation of the liability and damages portions of the case. The Second Circuit's earlier decision and order of July 29, 1999 reversed and remanded a decision by the district court denying plaintiffs' motion for class certification for failure to satisfy the standards of FRCP 23(a).

OPINIONS BELOW

The Second Circuit's decision of October 9, 2001 appears at pages A-1-38 of the Appendix to this Petition and is reported as *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001). The Second Circuit's decision of July 29, 1999, appears at pages A-39-66, and is reported as *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999). The decision denying Metro-North's Petition for Panel Rehearing and Petition for Rehearing *En Banc*, dated October 6, 1999, and captioned *Norris v. Metro-North*, appears at pages A-85-86 and is unpublished. The district court's decision denying plaintiffs' motions for class certification and bifurcation, dated September 27, 2000, appears at pages A-67-76, and is reported as *Robinson v. Metro-North Commuter Railroad Co.*, 197 F.R.D. 85 (S.D.N.Y. 2000). The district court's decision denying plaintiffs' motion for class certification under Rule 23(a), dated

August 8, 1997, appears at pages A-77-84, and is reported as *Robinson v. Metro-North Commuter Railroad Co.*, 175 F.R.D. 46 (S.D.N.Y. 1997).

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its most recent decision on class certification on October 9, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

The provisions of FRCP 23 are at issue in this Petition. The text of this rule appears at pages A-87-90 of the Appendix.

STATEMENT OF THE CASE

Plaintiffs asserted company-wide claims of racial discrimination in discipline and promotion on behalf of over 1,200 African-American employees at Metro-North. Their Complaint demanded both class-wide injunctive relief and individual monetary relief. The challenged decisions were made by hundreds of individual supervisors acting pursuant to company policies and procedures that plaintiffs conceded were nondiscriminatory. The Second Circuit nevertheless ruled that plaintiffs satisfied the requirements of commonality and typicality under FRCP 23(a). The court subsequently ruled that all, or at least the class-wide liability portion, of their claims should be certified under FRCP 23(b)(2), even though FRCP 23(b)(2) is available only for claims seeking predominantly injunctive or declaratory relief.

1. *Metro-North's Operations*

Metro-North is a public benefit corporation responsible for providing commuter rail transportation between New York City and its northern suburbs, including Connecticut. It employs approximately 5,700 employees in 220 different occupations, spread over 37 departments at numerous locations in New York City and its suburbs to the north. Some 4,700 of these employees ("union employees") are represented by one of Metro-North's 16 unions.

2. *Metro-North's Decentralized Procedures For Disciplining Union Employees*

Pursuant to procedures set forth in the applicable collective bargaining agreements and the Railway Labor Act, 45 U.S.C. § 153(Second), a supervisor or manager may bring "charges" against a union employee for violations of Metro-North's policies, procedures and safety rules. There are over 400 supervisors and managers with authority to bring such charges. Following an investigation conducted by a hearing officer, the charging supervisor determines what, if any, discipline to impose. The employee may then appeal the imposition of discipline, first to the Labor Relations Department, and ultimately to a 3-person binding arbitration panel, with a neutral arbitrator holding the deciding vote.

3. *Metro-North's Decentralized Promotion Process*

Decisions concerning the movement of employees into management-level positions, either from other positions at Metro-North or from outside the company, are made by 125 managerial and supervisory employees located throughout the company who are known as "hiring representatives."

Promotion decisions are governed by company-wide policies and procedures designed to prevent arbitrary conduct and ensure that the most qualified candidates are considered. Representatives of Metro-North's Personnel Department review closely with the hiring representatives the basis for each hiring or promotion decision and report to their superiors any issues concerning the appropriateness of a selection.

4. *Plaintiffs' Complaint*

In October 1994, seven plaintiffs commenced *Robinson v. Metro-North Commuter Railroad*, 94 Civ. 7374, alleging claims under, *inter alia*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e), *et seq.* Pursuant to subsequent amendments, the Complaint eventually included 16 other individuals. In October 1995, a second Title VII lawsuit, *Norris v. Metro-North Commuter Railroad*, 95 Civ. 8594, was brought on behalf of five (later seven) other plaintiffs.

The Complaints alleged a company-wide pattern and practice of racial discrimination in discipline and promotion and a disparate impact claim, on the basis of which plaintiffs demanded injunctive and equitable relief and compensatory damages. The compensatory relief demanded included: "monetary damages for loss of income, including bonuses and merit raises, managerial pension plan contributions, due to wrongful suspension, wrongful termination, failure to promote; and for serious and permanent emotional distress due to degradation, denigration, harassment, and humiliation." Although the Complaints also demanded punitive damages, plaintiffs later conceded that such relief is not available because Metro-North is a governmental agency.

5. Plaintiffs' First Motion for Class Certification

Following discovery limited to class certification issues, plaintiffs in the two lawsuits filed a consolidated motion seeking certification of a class consisting of all present and former African-American employees. Plaintiffs conceded that the central organs of the company responsible for those decisions – including the Personnel and Labor Relations Department – had not engaged in any discriminatory conduct. Nevertheless, based largely on an expert statistical report containing "regression" analyses of company-wide data on the frequency with which African-American and White employees are disciplined and promoted, plaintiffs contended that they had satisfied Rule 23(a)'s commonality and typicality requirements with respect to both their pattern and practice disparate treatment claim and their disparate impact claim.[1]

In response to plaintiffs' motion, Metro-North submitted the statistical report of its own expert, who opined that the statistical disparities identified in plaintiffs' expert report were not manifested throughout the company and, thus, did not support a finding of commonality and typicality. The expert demonstrated that plaintiffs' expert report suffered from the "fallacy of composition," pursuant to which data which did not reveal any race-based disparities when examined on a departmental or occupational basis became camouflaged when merged together with data on other departments or

[1] FRCP 23(a) requires, *inter alia*, that plaintiffs demonstrate that "there are questions of law or fact common to the class" and "the claims or defenses of the representative parties are typical of the claims or defenses of the class." (A-87)

occupations. (A-46)[2] Among other things, Metro-North's expert observed that:

- There were huge differences in the number of disciplines and promotions among the departments;
- There were no recorded disciplines at all in 25 of Metro-North's 37 departments;
- When broken down by positions, the data did not reveal any disparities in the discipline rates for African-Americans and Whites in departments employing at least 52% of the employees of the company; and
- When limited to positions from which employees had been promoted, the data revealed no disparities between the promotion rates for African-American and White employees.

In apparent recognition of the force of these arguments, plaintiffs' expert eventually prepared a table that examined the rates of discipline (but not promotion) for each position, but this merely confirmed that there were many positions, occupied by a substantial portion of the workforce, in which

[2] This phenomenon was most graphically demonstrated with data from the Grand Central Terminal (GCT) Department, which alone comprises more than 5% of the workforce. Even though aggregate figures for the GCT Department showed a disparity between the rates of discipline for African-American and White employees, this seeming disparity disappeared once the data were broken down by position. Of the 50 job titles in GCT, there were 30 for which no discipline was imposed; of the remaining 20, eight showed a larger average number of disciplines for White employees than for African-Americans, and only seven showed a larger average number of disciplines for African-Americans.

there was no race-based statistical disparity and, thus, no basis for linking the challenged decisions to a common cause.

6. The District Court's Decision on Class Certification under 23(a)

In an opinion and order dated August 8, 1997, the district court denied plaintiffs' motion for class certification, finding that plaintiffs had failed to satisfy either the commonality or typicality requirements of FRCP 23(a). (A-84) In reaching this conclusion, the district court found that:

> plaintiffs' statistics, even taken most favorably to plaintiffs, cannot carry their burden here, because they fail to take account of the fact that different Metro-North positions have materially different individual rates of discipline and of promotion associated with them. . . . [W]hen these differences are taken into account, no statistically significant racial disparities, either for discipline or promotion, can be established with respect to the great majority of the positions at Metro-North.

(A-80-81) The court also concluded that, "[p]roblems of proof aside, there is a more fundamental problem with plaintiffs' approach to commonality, in that, even while seeking certification of a company-wide class, they concede that defendant's standardized, company-wide policies and procedures relating to discipline and promotion are (and were at all relevant times) non-discriminatory." (A-82)

7. Subsequent Proceedings Before the District Court

Following the completion of discovery, Metro-North filed an omnibus motion for summary judgment, which resulted in

the dismissal of the vast majority of the individual claims. The seven remaining plaintiffs then entered into an agreement with Metro-North that settled their individual claims for relief, but permitted them to appeal the decision denying their motion for class certification.[3] Since then, no one else has sought to join as a named plaintiff.

8. The Decision by the Court of Appeals for the Second Circuit on Class Certification Under Rule 23(a)

On July 29, 1999, the Second Circuit reversed the district court's finding that plaintiffs had failed to satisfy Rule 23(a) and remanded the case to the district court with instructions to consider whether the Complaints also satisfied one of the criteria for class certification under Rule 23(b).

The court concluded that, even though the challenged decisions were admittedly made on a decentralized basis, plaintiffs could sustain class claims of both disparate treatment and disparate impact by virtue of their allegation that Metro-North maintained a policy of "delegation" of subjective decision-making to a decentralized force of supervisors. In so ruling, the court found that plaintiffs' expert statistical report provided adequate evidence of class-wide discrimination, for purposes of sustaining the commonality and typicality requirements of Rule 23(a), and that, by crediting "Metro-North's expert evidence over that of the Class Plaintiffs," the district court had engaged in an inappropriate weighing of the evidence on the merits of the discrimination allegations. (A-57) In other words, the Second Circuit did not

[3] Except Veronica Caridad, whose appeal from the dismissal of her sexual harassment claim was unsuccessful, none of the plaintiffs appealed the dismissal of their claims on the merits.

criticize the substance of the district court's analysis, but held that such an analysis should not have been conducted at this stage of the proceedings.[4]

In dissent, Judge Walker criticized the panel's conclusion that "Metro-North's practice of delegating personnel decisions – plaintiffs prefer to call it 'overdelegation' – constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a)." (A-64) He argued that "plaintiffs must identify a common policy or practice, to which they were all subjected, that resulted in discrimination" because "Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination." (*Id.*) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

9. *The District Court's Decision on Rule 23(b) Certification*

Pursuant to the Second Circuit's instructions, the district court thereafter entertained plaintiffs' motion for certification under either Rule 23(b)(2) or (3), as well as a motion for bifurcation of the liability and damages portions of the trial. In a Memorandum Order dated September 27, 2000, the district court denied both motions. (A-76)

The district court determined that certification under Rule 23(b)(2) was not appropriate because the relief sought was not "'exclusively or predominantly injunctive or declaratory,'" as

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[4] Nevertheless, without relying on Metro-North's expert report, the court excluded from the potential class employees occupying positions in which plaintiffs' expert had not found any statistical disparity between the percentage of disciplinary actions against African-American and White employees. No limitations were placed on the size of the class with respect to the promotion claim.

required by that Rule. (A-69) (citation omitted)[5] In so ruling, the court referred to a test recently devised by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 410 (5th Cir. 1998), pursuant to which Rule 23(b)(2) certification was available only if the "monetary relief were wholly 'incidental' to the requested injunctive relief." (A-70) (citation omitted) The district court also held, however, that "[e]ven . . . if some less rigorous standard than that formulated by the Fifth Circuit were applied, by any reasonable standard, and on any reasonable view of this case, the[] multiple individual determinations of damages for the numerous members of the class here proposed would overwhelm classwide injunctive issues . . . ." (A-71)

The court rejected plaintiffs' alternative motion to bifurcate the liability and damages portions of the case, finding that the individualized determinations of liability that would be necessitated by plaintiffs' disparate treatment claims would "overwhelm the liability phase of any trial nearly as much as they would overwhelm any damages phase, once again rendering class action treatment inappropriate under Rule 23(b)(2)." (A-72) It also found that plaintiffs could not satisfy Rule 23(b)(3)'s requirements because common issues did not

[5] By it terms, FRCP 23(b)(2) is available only where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." (A-87-88) The courts have consistently interpreted this requirement to mean that the claim must be "exclusively or predominately injunctive or declaratory." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974).

predominate,[6] and "the class action approach, far from being more efficient than individual actions, would be hopelessly complicated and prolonged (and made even more so if plaintiffs suggestions for bifurcation were adopted)." (A- 73)

10. The Second Circuit's Decision on Rule 23(b) Certification

On October 9, 2001, the Second Circuit vacated the district court's decision and remanded the case to the district court with instructions to: consider further whether the pattern and practice disparate treatment claim is appropriate for certification under Rule 23(b)(2); and to certify in any event the class-wide liability portion of that claim, as well as the disparate impact claim.[7]

The court rejected the Fifth Circuit's "incidental damages" test, which it characterized as a "bright-line" rule that would act as an absolute bar to claims seeking compensatory and punitive damages. (A-22) Instead, the court devised an "ad hoc" test, pursuant to which the district court must assess "'the relative importance of the remedies sought,'" and may allow (b)(2) certification if it finds in its "'informed, sound judicial discretion' that (1) 'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed,' and (2) class treatment would be efficient

[6] FRCP 23(b)(3) conditions certification on a finding that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." (A-88)

[7] Like the previous ruling, the decision went to considerable lengths to emphasize that the court was not endorsing the merits of the underlying claims. In fact, the court observed that "two federal judges have previously expressed skepticism about the underlying merits of the claims." (A-38 n.15)

and manageable, thereby achieving an appreciable measure of judicial economy."[8] (A-23) (citation omitted)

The court accordingly remanded the case to the district court with instructions to "reconsider the propriety of (b)(2) certification" using the new ad hoc test. (A-28) The court also directed, however, that regardless of the district court's disposition of the (b)(2) issue under the ad hoc test, it must certify under (b)(2) the liability portion of the pattern and practice disparate treatment claim, as well as the disparate impact claim, and that the district court had "abused its discretion" in concluding otherwise. (A-32)[9]

REASONS FOR GRANTING THE WRIT

The *Robinson* and *Caridad* decisions raise significant issues regarding the scope of class certification that this Court has not addressed for nearly twenty years. In sharp contrast to the rulings of most other circuit courts that have addressed these issues, the Second Circuit has adopted an expansive approach that would allow class actions to proceed even though: (i) the

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[8] Explaining how the test would operate in practice, the court stated:

> [B]efore allowing (b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.

(A-23)

[9] The court also rejected the district court's alternative finding that the named plaintiffs were no longer adequate class representatives because they had settled their claims for individual relief. (A-36-37)

challenged decisions giving rise to the underlying claims of discrimination were made separately by hundreds of different supervisors acting pursuant to policies that were admittedly non-discriminatory; (ii) the company has refuted the validity of the statistical evidence on which plaintiffs purport to link these decisions for purposes of satisfying the standards for class certification; and (iii) the determination of the individual class member's entitlement to relief would require countless adjudications of individual liability and damages issues before multiple juries.

Working in combination, the two rulings virtually guarantee that any employee alleging a pattern and practice of discrimination in the Second Circuit can proceed with a company-wide class action on the basis of little more than raw statistical data, and without regard to the practical and legal obstacles to trying such claims to completion. Whereas other circuit courts, mindful that the specter of a class action trial can bludgeon employers into accepting exorbitant settlements, have required vigorous inquiries into the factual and statistical assertions supporting class certification, the Second Circuit has required that district courts accept these assertions with little scrutiny and without regard to the countervailing arguments of the company's experts. Furthermore, whereas other circuit courts have endorsed a test that sharply limits the circumstances in which actions seeking compensatory damages may be certified under Rule 23(b)(2), the Second Circuit has rejected that test in favor of a more permissive test, coupled with the requirement that the class-wide liability and injunctive relief issues be certified for trial regardless of whether the individual claims for relief are certified.

These pending disputes among the circuit courts are largely attributable to disagreements over the interpretation of Supreme Court rulings that date back decades, before class action employment discrimination lawsuits challenged decentralized decision-making, sought compensatory damages, and were tried before juries. The Court should now revisit these issues and address them in the context of the present-day circumstances that are dividing the circuit courts.

I.
THE SECOND CIRCUIT'S REFUSAL TO CONSIDER AN EXPERT REPORT THAT CHALLENGED THE STATISTICAL ASSERTIONS SUPPORTING THE CLASS CERTIFICATION MOTION CONFLICTS WITH RULINGS OF NUMEROUS OTHER CIRCUITS

By rejecting the lower court's evaluation of the expert statistical report, and instead accepting without meaningful scrutiny the statistical report offered by plaintiffs to establish commonality and typicality under Rule 23(a), the Second Circuit adopted an approach to class certification that conflicts with recent rulings by several circuit courts, both within and outside the context of employment discrimination suits. The disagreement among the circuit courts stems from differing constructions of earlier Supreme Court decisions on the scope of the class certification inquiry.

The Second Circuit's approach is based on its application of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which ruled that district courts could not conduct a preliminary hearing for the purpose of determining whether defendants should bear the costs of issuing a class notice. In that limited context, the

Court stated that district courts lacked "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. Based on *Eisen*, the Second Circuit ruled in *Caridad* that the district court could not consider the statistical report of Metro-North's expert because doing so would overlap with the evaluation of the merits.

The Second Circuit recently adhered to this approach in *Visa Check/MasterMoney Antitrust Litigation v. Visa, U.S.A. Inc.*, No. 00-7699, 2001 U.S. App. LEXIS 22480, at *18-19 (2d Cir. Oct. 17, 2001),[10] where the court sharply limited its scrutiny of an expert report which, in support of plaintiffs' motion for class certification, set forth plaintiffs' theory of class-wide antitrust injury.[11] Citing *Caridad*, the court stated that "a district court may not weigh conflicting expert evidence," but rather should merely "ensure that the basis of [plaintiffs'] expert opinion is not so flawed that it would be inadmissible as a matter of law." *Id.*

In sharp contrast to the rulings of the Second Circuit, both the Third and Seventh Circuits have specifically rejected the notion that *Eisen*'s *dicta* was ever meant to limit the scope of a district court's inquiry into whether the criteria for class certification have been satisfied. Instead, these courts have been guided by this Court's subsequent pronouncements in

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[10] Copies of unreported decisions are being provided to the Court separately.

[11] *See also Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001) (adopting similar approach to class certification for claims brought under Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, even though such claims are not governed by FRCP 23).

General Telephone Co. v. Falcon, 457 U.S. 147 (1982), where the Court rejected plaintiffs' efforts to certify a class for "across the board" claims of employment discrimination. The Court recognized that "'the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" and instructed the district courts to engage in a "rigorous analysis" to determine if the criteria for class certification have been satisfied. *Id.* at 160-61 (citation omitted).

Applying *Falcon*, in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677-78 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), the Seventh Circuit overturned the granting of a motion for class certification upon finding that the district court had erroneously refused to evaluate factual assertions that supported not only the merits of the claim but also plaintiff's class certification motion. Rejecting the district court's theory that *Eisen* "adopts the approach of Rule 12(b)(6) for decisions under Rule 23," the court stated: "The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it. . . . Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification." *Id.* at 675, 677.

More recently, in upholding the denial of a motion for class certification for failure to satisfy Rule 23(b)(3)'s predominance requirement, the Third Circuit stated: "not only was it appropriate, but also necessary, for the district court to examine the factual record underlying plaintiffs' allegations in making its certification decision." *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 189 (3d Cir. 2001). In so ruling, the court

relied heavily on the Third Circuit's decision in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001), which found, after a thorough evaluation of the pertinent factual allegations, that plaintiffs had failed to satisfy the requirements of Rule 23(b)(3). *Johnston*, 265 F.3d at 189.

Several other courts – including the Fourth, Fifth and Eleventh Circuits – have similarly discounted *Eisen*, and relied on *Falcon* as a basis for engaging in a rigorous evaluation of the grounds for class certification that may overlap with an evaluation of the merits. *See, e.g., Nelson v. United States Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) ("evidence relevant to the commonality requirement is often intertwined with the merits"); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 n.12 (4th Cir. 1980) ("*Eisen* cannot of course be read to forbid any pre-trial inquiry designed to establish the class action criteria that happens to touch on matters that may also relate to the merits of the class or individual claims as alleged."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.").

Consistent with this approach, many courts have denied class certification motions in employment discrimination cases upon finding that the statistical evidence offered in support of the motion could not withstand the "rigorous analysis" mandated by *Falcon*. *See Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1275-76 (8th Cir. 1990); *Stastny*, 628 F.2d at 278-80, 282; *Cooper v. Southern Co.*, No. 1:00-CV-2231-ODE, 2001 U.S. Dist. LEXIS 16809, at *63-64 (N.D. Ga. Oct. 11, 2001); *Abram v. UPS*,

200 F.R.D. 424, 433 (E.D. Wis. 2001); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 560-61 (D.S.C. 2000); *Betts v. Sundstrand Corp.*, No. 97 C 50188, 1999 U.S. Dist. LEXIS 9743, at *11-13, *21-22 (N.D. Ill. June 21, 1999); *Gonzalez v. Brady*, 136 F.R.D. 329, 332-33 (D.D.C. 1991); *Danielson v. Fletcher*, 132 F.R.D. 489, 491-92 (N.D. Ohio 1990); *Ross v. Nikko Sec. Co. Int'l*, 133 F.R.D. 96, 97 (S.D.N.Y. 1990); *Price v. Cannon Mills*, 113 F.R.D. 66, 70-71 (M.D.N.C. 1986); *Harris v. Marsh*, 100 F.R.D. 315, 321-22 (E.D.N.C. 1983); *Ray v. Phelps Dodge Brass Co./Lee Bros.*, 35 Fair Empl. Prac. Cas. (BNA) 1004, 1006-07 (N.D. Ala. 1983).

For example, in *Chaffin v. Rheem Manufacturing Co.*, the Eighth Circuit upheld the district court's finding that the plaintiffs' statistical evidence – which compared the percentage of African American promotions in a particular department to the percentage of African-Americans in that department – was "too bareboned" to justify class certification. 904 F.2d at 1276. In so ruling, the court rejected plaintiffs' contention that the lower court's analysis of the statistical evidence "constituted an impermissible premature inquiry into the merits of [plaintiffs'] claim." *Id.* at 1275.

Similarly, in *Stastny v. Southern Bell Telephone & Telegraph Co.*, the Fourth Circuit, in overturning the lower court's certification of a broad class encompassing multiple facilities, found fault with the plaintiffs' statistical evidence of state-wide racial disparities because there was no showing that "overall disparities were paralleled in the separate facilities or even a statistically reliable sample of them." 628 F.2d at 279.

In this case, there was a particularly compelling need for similarly scrutinizing plaintiffs' statistical evidence because the

evidence was offered to establish a basis for class certification that, heretofore, had been rejected by the overwhelming majority of courts; namely, that, notwithstanding the decentralized nature of the decision-making process, "Metro-North's practice of delegating personnel decisions – plaintiffs prefer to call it 'overdelegation' – constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a)." (A-64) (Walker, J. dissenting)[12] With the help of Metro-North's expert report, the district court determined that plaintiffs had failed to demonstrate commonality or typicality with this theory because the statistical disparities relied on by plaintiffs' expert varied tremendously by department, location and position and, thus, could readily be attributed to independent causes.

Consistent with the distinction between the merits and the class determination drawn by this Court in *Falcon*, as well as

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[12] Numerous authorities – including the Fourth Circuit – have denied motions for class certification of disparate treatment claims upon finding that the alleged discriminatory practices were decentralized in nature. *See, e.g., Stastny*, 628 F.2d at 279; *Abram*, 200 F.R.D. at 432-33; *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 544-45 (D.N.J. 2001); *Cooper*, 2001 U.S. Dist. LEXIS 16809, at *106-07; *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541-42, 544 (N.D. Ala. 2001); *Lott*, 200 F.R.D. at 557-61; *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238-40 (W.D. Tex. 1999); *Betts*, 1999 U.S. Dist. LEXIS 9743, at *11-13, *21-22; *Appleton v. Deloitte & Touche LLP*, 168 F.R.D. 221, 231-32 (M.D. Tenn. 1996); *Brooks v. Circuit City Stores, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 102, 105 (D. Md. 1996). *But see Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir.) (holding that a discrimination claim can be certified as a class action when the decision-making process is found to be "entirely subjective"), *cert. denied*, 510 U.S. 991 (1993); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561, 563 (8th Cir. 1982) (certifying class claims where a staff of white supervisors made promotional decisions based primarily on subjective criteria), *cert. denied*, 460 U.S. 1083 (1983).

the approach taken in *Chaffin* and *Stastny*, Metro-North's expert focused, not on the merits of whether Metro-North was engaged in a pattern and practice of discrimination, but on whether there was statistical evidence to support the inference that the acts of discrimination alleged by the named plaintiffs were occurring on a class-wide basis. *See also Hopewell v. Univ. of Pittsburgh*, 79 F.R.D. 689, 694 n.2 (W.D. Pa. 1978) ("It is only proper that statistics be given the same rigorous analysis in a Rule 23 determination as would be given on the merits. The question here is not what the statistics prove, but rather what they mean."). By refusing to accept Metro-North's expert report for this limited purpose, the Second Circuit has effectively determined that, whenever an employer's challenge to the plaintiffs' statistical showing overlaps to any extent with the evaluation of the merits, that challenge must be rejected at the class certification stage, and the plaintiffs' statistical showing must be accepted without further scrutiny.

The court's legal position not only differs sharply from the positions of other circuit courts,[13] but also has huge public policy implications. Numerous courts, including the Third Circuit Court of Appeals, have observed that granting class certification merely because the Rule 23 issues overlap with the

[13] The *Caridad* decision cannot even be harmonized with prior precedent in the Second Circuit. Prior to *Caridad*, the Second Circuit's leading authority on this issue, *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir.), *cert. denied*, 488 U.S. 891 (1988), upheld the denial of a motion for class certification and, in so doing, approved the lower court's findings that: (i) the omission of variables from a regression analysis reduced the probative value of plaintiffs' statistical evidence; and (ii) plaintiffs' statistical analysis failed to take into account various relevant non-discriminatory factors such as job level, education and work experience.

merits "may generate unwarranted pressure to settle nonmeritorious or marginal claims." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) (citing *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995) and *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995)); *see Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) ("Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this [discrimination] case as a class action; nothing, that is, except the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement."), *cert. denied*, 121 S. Ct. 1354 (2001); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle . . . .").

Even the Second Circuit recognized the "intense pressures to settle that often follow a class certification decision." (A-38 n.15) *See also Visa Check/MasterMoney Antitrust Litig. v. Visa, U.S.A. Inc.*, No. 00-7699, 2001 U.S. App. LEXIS 22480, at *59 (2d Cir. Oct. 17, 2001) (Jacobs, J., dissenting) ("Even a defendant who is innocent and holy may rationally choose to pay a few hundred million dollars in settlement of a class action rather than 'run the risk of ruinous liability.'"). Yet this would be precisely the result if plaintiffs could automatically proceed to a jury trial of company-wide pattern and practice discrimination claims without any regard to whether the claims of the named plaintiffs (the vast majority of which had

already been found entirely lacking in merit in this case) were representative of the claims of an aggrieved class.

In short, the disagreement among the circuit courts on the scope of the Rule 23 inquiry has enormous legal and practical implications. This Court should, therefore, grant certiorari in order to reaffirm and clarify the discretionary authority of the district courts to analyze and evaluate fully the evidence supporting and opposing class certification motions, as it originally directed in *Falcon*.

II.

THE SECOND CIRCUIT'S STANDARD FOR CLASS CERTIFICATION UNDER RULE 23(b)(2) CONFLICTS WITH THE RULINGS OF OTHER CIRCUIT COURTS

The ruling in *Robinson* has widened a gap that was already developing among the circuit courts as to the proper application of Rule 23(b)(2) in the aftermath of the Civil Rights Act Amendments of 1991, which for the first time permitted claims for recovery of compensatory and punitive damages, and the right to a jury trial, in Title VII suits alleging employment discrimination. In contrast to the Fifth Circuit, which has sharply limited the grounds for Rule 23(b)(2) certification, the Second Circuit has now adopted an "ad hoc" test which will permit more widespread certification under Rule 23(b)(2). Moreover, by virtue of its corollary ruling on bifurcation, the Second Circuit will now automatically permit certification of the liability portion of a pattern and practice claim, a practice that no other circuit court has endorsed and that the Fifth Circuit expressly prohibited.

A. The Second Circuit's "Ad Hoc" Test Conflicts with the "Incidental Damages" Test Adopted by the Fifth, Sixth, Seventh, and Eleventh Circuits

In *Allison v. Citgo Petroleum Corp*, 151 F.3d 402 (5th Cir. 1998), the Fifth Circuit held that, notwithstanding the plaintiffs' satisfaction of the criteria for certification under Rule 23(a), the requirements of Rule 23(b)(2) were not satisfied in an employment discrimination suit brought on behalf of a class of African-American employees and job applicants who were seeking injunctive, declaratory and monetary relief and punitive damages for alleged discrimination in hiring, promotion, compensation and training policies at the defendant's manufacturing facilities.

Building on the requirement that, to satisfy Rule 23(b)(2), claims for class-wide injunctive and declaratory relief must predominate, *see* FED. R. CIV. P. 23(b)(2) advisory committee's notes (*supra* note 5), the court held that "monetary relief predominates," and therefore Rule 23(b)(2) certification is not available, "unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 415.[14]

[14] The *Allison* court identified three additional factors that should be applied to define "incidental" damages:

> First, such damages should be of the kind to which class members would be automatically entitled. Second, such damages should be computable by "objective standards," and not standards significantly reliant upon "the intangible, subjective differences of each class member's circumstances."

(continued...)

Applying its "incidental damages" test, the *Allison* court "[had] little trouble affirming the district court's finding that the plaintiffs' claims for compensatory and punitive damages are not sufficiently incidental to the injunctive and declaratory relief being sought to permit them in a (b)(2) class action." *Allison*, 151 F.3d at 416. With respect to the claims for compensatory damages, the court observed that "[t]he very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not classwide, remedy." *Id.* at 417. The court concluded that "[g]iven the degree to which recovery of compensatory and punitive damages requires individualized proof and determinations, they clearly do not qualify as incidental damages in this case." *Id.* at 418.

The Fifth Circuit recently reaffirmed the use of the "incidental damages" test in *Smith v. Texaco, Inc.*, 263 F.3d 394, 408 & n.16 (5th Cir. 2001), and the Seventh Circuit and numerous district courts throughout the country have also endorsed the use of the test in employment discrimination lawsuits. *See Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 580-82 (7th Cir. 2000) (vacating Rule 23(b)(2) certification of Title VII class because monetary damages sought by plaintiffs were not incidental to requested equitable relief); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (endorsing *Allison*'s principal holding that "[i]f Rule 23(b)(2) ever may be used when the plaintiff class demands

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[14] (...continued)

Third, such damages should not necessitate additional hearings. *Miller v. Hygrade Food Prods. Corp.*, 198 F.R.D. 638, 641 (E.D. Pa. 2001) (quoting *Allison*, 151 F.3d at 415).

compensatory or punitive damages, that step would be permissible only when monetary relief is incidental to the equitable remedy");[15] *Robertson v. Sikorsky Aircraft Corp.*, No. 3:97 CV 1216 (GLG), 2001 U.S. Dist. LEXIS 11662, at *24-29 (D. Conn. July 5, 2001); *Osgood v. Harrah's Entm't, Inc.*, 202 F.R.D. 115, 128-31 (D.N.J. 2001); *Miller*, 198 F.R.D. at 641-42; *Adams v. Henderson*, 197 F.R.D. 162, 171-72 (D. Md. 2000).

The Sixth and Eleventh Circuits have followed *Allison* in other contexts. *See Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (relying on *Allison* in concluding that Rule 23(b)(2) was not satisfied for claims by disabled individuals challenging administration of the state's Medicaid program, because plaintiffs did "not seek damages as a 'group remedy'") (citation omitted); *Butler v. Sterling, Inc.*, 210 F.3d 371, *reported in full at*, No. 98-3223, 2000 WL 353502, at *6 (6th Cir. Mar. 31, 2000) (citing *Allison* and affirming denial of FRCP 23(b)(2) certification of claims under the Truth in Lending Act because

[15] The Seventh Circuit cautioned, however, that even if a district were to rule that the incidental damages test was satisfied, the court would still have to consider whether Rule 23(b)(2) certification is ever appropriate for a claim seeking compensatory damages, as the Supreme Court has not previously addressed this question. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). Most courts that have permitted or contemplated Rule 23(b)(2) certification of suits containing claims for compensatory damages, including the Second Circuit (*see* A-25-26), have presumed that an opt-out notice would be used to protect the rights of class members who might wish to proceed separately with their claims for compensatory relief. The Supreme Court has expressed skepticism, however, as to whether Rule 23 authorizes opt-out notices for (b)(2) classes. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974) ("By its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2).").

monetary relief predominated); *see also Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1196 (9th Cir. 2000) (affirming decertification of 23(b)(2) class and stating that monetary damages claim could not be certified because "damages would hardly be incidental when the prospective relief portion of the action had become moot"), *cert. denied*, 121 S. Ct. 2192 (2001).

In sharp contrast to these rulings, the Second Circuit has now rejected *Allison*'s incidental damages test in favor of its "ad hoc" test, which assesses "'the relative importance of the remedies sought, given all the facts and circumstances of the case.'" (A-23) (citation omitted) The test has been applied in a few district court cases, but thus far has not been endorsed by any other circuit court in Civil Rights Act cases. *See Reeb v. Ohio Dep't of Rehab. & Corr. Belmont Corr. Inst.*, No. C200-CV-0074, 2001 U.S. Dist. LEXIS 17312, at *21-23 (S.D. Ohio Oct. 24, 2001); *Hoffman v. Honda of Am. Mfg., Inc.*, 191 F.R.D. 530, 535-37 (S.D. Ohio 1999); *see also Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (adopting "ad hoc" approach to evaluation of motion to certify class claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*).[16]

Under the Second Circuit's test, Rule 23(b)(2) certification will extend to any claim seeking individual monetary relief as long as the claims for injunctive and declaratory relief are significant enough that the plaintiffs might have pursued them in any event. (*See* A-23) The rule makes no allowance for the

[16] Outside the employment discrimination context, at least two circuit courts have applied a "facts and circumstances" test in concluding that claims for monetary damages predominated, and, thus, that Rule 23(b)(2) certification was unavailable. *See Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

fact that in cases such as this one, which challenge the decisions of hundreds of supervisors acting pursuant to a decentralized decision-making process, the second phase of the trial will ultimately overwhelm the class-wide liability phase. Indeed, each class member's claim for individual relief will require a separate adjudication, before a separate jury, based on the unique facts and circumstances pertaining to the particular supervisor responsible for the employment decisions pertaining to that class member.[17]

At a minimum, the Second Circuit's test will generate different outcomes to class certification motions in employment discrimination cases than the rule devised by the Fifth Circuit and adopted by the Seventh Circuit. In order to avoid such conflicting results, the Supreme Court must determine which one of these tests, or whether an alternative test for certification under Rule 23(b)(2), should govern.

B. The Second Circuit's Approach Widens a Split Among the Circuit Courts on the Use of Partial or Hybrid Certification

Prior to the Second Circuit's decision in *Robinson*, a number of courts had expressed the concern that an unquestioning

[17] Although the Second Circuit gave short shrift to the issue (A-32 n.13), there is a serious question as to whether such multiple trials would run afoul of the Seventh Amendment's Reexamination Clause. *Compare* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305, 337-46 (2001), *with* Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1864-68, 1876-79 (2000). Elsewhere, courts have construed the Clause narrowly, so as to prohibit the type of multiple examinations of overlapping factual questions that occur here. *See, e.g., Allison*, 151 F.3d at 422-25; *Ramirez v. DeCoster*, 194 F.R.D. 348, 354 & n.4 (D. Me. 2000).

application of *Allison*'s "incidental damages" test could have the unintended effect of precluding certification of the same types of lawsuits that might otherwise have been certified under Rule 23(b)(2) prior to the Civil Rights Act Amendments. In an effort to address this concern, some courts have sought imaginative ways to permit certification, notwithstanding the application of the "incidental damages" test. For example, the Seventh Circuit left with the district court the discretion to consider hybrid certification of the class-wide liability portion of the case under Rule 23(b)(2) and of the individual relief portion under Rule 23(b)(3). *See Jefferson v. Ingersoll, Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577 (7th Cir. 2000).

The Second Circuit's approach goes well beyond the Seventh Circuit's approach. Not only does it reject *Allison*'s incidental damages test altogether, but it requires certification of the class-wide liability portion of a pattern and practice claim without regard to whether the individual relief portion of the case is suitable for class certification under Rule 23(b)(2) or (b)(3). The court reached this result by relying on FRCP 23(c)(4), which states that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues." (A-29)

The Fifth Circuit expressly rejected this approach in *Allison*, where the plaintiffs moved, pursuant to Rule 23(c)(4), to bifurcate the class-wide liability portion of the case from the individual relief stage, and to certify the former under Rule 23(b)(3). Citing its earlier ruling in *Castano*, the Fifth Circuit characterized this effort as an "attempt to 'manufacture predominance through the nimble use of subdivision (c)(4).'"

Allison, 151 F.3d at 422 (citation omitted). As *Castano* and *Allison* observed, "'reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.'"[18] *Id.* (citation omitted)

The same observations could be made here. The Second Circuit's cavalier attitude toward partial certification turns a blind eye to the profound practical effects of this device. As the Fifth Circuit observed: "[W]e should not condone a certification-at-all-costs approach . . . for the simple purpose of forcing a settlement. Settlements should reflect the relative merits of the parties' claims, not a surrender to the vageries of an utterly unpredictable and burdensome litigation procedure." *Allison*, 151 F.3d at 422 n.17; *see also Visa Check/MasterMoney Antitrust Litig. v. Visa, U.S.A. Inc.*, No. 00-7699, 2001 U.S. App. LEXIS 22480, at *70-71 (2d Cir. Oct. 17,

[18] Some district courts, like the Second Circuit, have certified the class-wide liability portion of the case before determining whether the balance of the case would be certified, but in doing so have recognized that, in order for the case to be tried before a jury, the class must include claims for compensatory or punitive damages. *See, e.g., Butler v. Home Depot*, No. C-94-4335, 1996 U.S. Dist. LEXIS 3370, at *18-19 (N.D. Cal. Jan. 25, 1996); Piar, *supra* note 16, at 339-41; *see also* 42 U.S.C. § 1981a(c) (providing right to jury trial in claims seeking damages). The Second Circuit decision makes no allowance for this issue. It merely instructs the district court to conduct a jury trial with respect to the class-wide liability claims, without explaining why a jury should try such claims in a case where the class representatives' individual claims were already settled and punitive damages are unavailable. (A-35-38)

2001) (Jacobs, J., dissenting) ("[C]ertification leads to unfairness and injustice: if the district court later finds that a trial is unmanageable, the named plaintiffs and their counsel lose nothing, but in the meantime they have in hand the means to extract a favorable settlement of what may be weak claims.").

Accordingly, in conjunction with any ruling on the appropriate test for Rule 23(b)(2) certification, this Court should also resolve the split among the circuit courts as to the circumstances, if any, under which bifurcation and partial certification are appropriate in employment discrimination lawsuits.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MYRON D. RUMELD
Counsel of Record
SHARI B. FALLEK
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

Counsel for Petitioner

Of Counsel:

RICHARD K. BERNARD
Vice President and
General Counsel
CAROL SUE BARNETT
Deputy General Counsel
METRO-NORTH COMMUTER
RAILROAD COMPANY
347 Madison Avenue
New York, NY 10017
(212) 340-3000

New York, New York
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